NO. 782

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

Alfred Young Chick and William Plowden Lewis, Co-partners under the firm name and style of A. Y. Chick & Company,

Appellants,

vs.

The Mercantile Trust Company and the San Joaquin Electric Company,

Appellees.

Motion to Dismiss Appeal and Accompanying Brief.

ALEXANDER & GREEN,
CHAS. MONROE,
Solicitors for The Mercantile Trust Company, Appellee.

Filed January *190*

. . . . *Clerk*

[illegible] J. [illegible]cer, Law Printer, [illegible]-242 New High St

FILED
JAN 27 1902

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

A. Y. Chick *et al.*,
Appellants,
vs.
The Mercantile Trust Company, *et al.*,
Appellees.

MOTION.

Now comes the Mercantile Trust Company, a corporation, and moves the Court to dismiss the appeal of Alfred Young Chick and William Flanders Lewin, doing business under the firm name and style of A. Y. Chick & Company, because the order from which said appeal was taken and allowed is not and was not an appealable order for the following reasons:

1. Because said order was not a final order, decision, judgment or decree.

2. Because said order was discretionary with the Circuit Court.

This motion will be made upon the Transcript filed in this Court.

ALEXANDER & GREEN,
CHAS. MONROE,
Solicitors for Mercantile Trust Company, a Corporation, Appellee.

To Works & Lee, Lewis A. Groff, and Geo. E. Church, Solicitors for Appellants.

You and each of you are hereby notified that the foregoing motion will be called up for hearing before the United States Circuit Court of Appeals for the Ninth Circuit, on Tuesday, the 4th day of February, 1902, at the opening of Court on that day, or as soon thereafter as counsel can be heard, in the courtroom of said Court of Appeals, in the city and county of San Francisco, state of California.

ALEXANDER & GREEN,
CHAS. MONROE,
Solicitors for The Mercantile Trust Company, Appellee.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

A. Y. Chick *et al.*,
Appellants,
vs.
Mercantile Trust Company
(a corporation) et al.,
Appellees.

Brief Accompanying Motion to Dismiss Appeal.

This is a suit to foreclose a trust deed given by the San Joaquin Electric Company to secure the payment of bonds. The complainant is the trustee under said trust deed.

After the bill was filed and before the answer of defendant was filed or was due, a paper styled "Petition in Intervention, Bill of Intervention, and Notice of Motion to Intervene of Alfred Y. Chick and William Flanders Lewin, partners as A. Y. Chick & Company," was served upon the complainant and defendant and the next day upon the receiver. The application was continued from time to time, and finally, on February 5th, 1900, the said petition was filed, but the application for leave to intervene was continued until February 19th, when objection was made by complainant that the peti-

tion was verified by counsel instead of by a party and upon information and belief. The Court required the petition to be verified by one of the parties. A new petition, verified absolutely by A. Y. Chick, was filed on the 2nd day of April, 1900, and the matter came up for hearing on the 9th of April. The complainant on the 23rd day of April asked leave to file an answer to the petition in intervention. The court denied the application to file an answer and allowed the bill in intervention to be filed and directed that issue be joined on that bill, so that the question as to whether A. Y. Chick & Company could intervene could be tried properly. The complainant, defendant and receiver, answered the bill of intervention denying its allegations, and when the issues were completed upon the bill in intervention, testimony was taken upon those issues alone, and the suit was set down for hearing and was heard upon those issues alone, and it was decided by the court that the order permitting A. Y. Chick & Company to intervene should not have been made and it was vacated.

A. Y. Chick & Company were bondholders and their claim was that the default in payment of interest was occasioned by fraud and collusion and that there was no necessity for a foreclosure. No claim was made that other bondholders were deriving any benefit in which they could not share, and there were practically no issues raised by that bill in intervention except as to whether the foreclosure suit was properly brought.

The defendant had filed answer to the original bill practically admitting the allegations contained

therein, but up to the time of the order vacating the leave to intervene there had been no hearing upon the original bill and answer. Subsequently a motion was made for decree upon the bill and answer and the suit has since gone to decree.

The act creating the Circuit Courts of Appeal provides:

> "That those courts shall exercise appellate jurisdiction to review, by appeal or writ of error, final decisions in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law."

It has been repeatedly held that an order refusing leave to intervene in a suit like the present one is not an appealable order. It was so held in the case of *Ex parte* Cutting, 94 U. S. 14; 24 L. Ed. 49, 51. In that case stockholders of a company against which a mortgage was sought to be foreclosed claimed that the officers of the defendant company were interested in the mortgage and did not intend to resist the foreclosure and therefore themselves asked leave to intervene. The motion was denied and the Supreme Court said that it "was only a motion in the cause and not an independent suit in equity appealable here."

In the case of Lewis v. Baltimore & L. R. Co.. 62 Fed. Rep. 218, it was decided that an order denying leave to intervene in a case was in no sense a final judgment and was not appealable. So much appeared by the syllabus. In the opinion it was stated that the party desiring to intervene was not a necessary party

and even were he a proper party, still this was within the discretion of the court.

In the case of Credits Commutation Co. *et al.*, v. United States, 91 Fed. Rep. 570, a party to whom permission to intervene had been denied sought to appeal and his appeal was dismissed because the order was not a final order from which an appeal would lie. The Circuit Court denying the leave to intervene ordered that "the prayers of the petitioners for leave to intervene herein be and the same are hereby denied, not as a matter of discretion, but because said petitions do not state facts sufficient to show that the petitioners, or either of them, have a legal right to intervene." Motion to dismiss was made on the ground that the order from which the appeals were taken was not a final judgment or decree from which an appeal would lie to the court of appeals, and upon the further proposition that the action of the lower court, in refusing leave to intervene was not reviewable on appeal, inasmuch as it rested in the sound discretion of the chancellor to admit or reject the intervention, and in that case the order of the court denying leave to intervene was made after a hearing. The practice in that case, and which seems to us the better practice, was upon presentation of the intervening petition, to order all parties in interest to show cause, on a day specified, why the prayer of petitioners for leave to intervene should not be granted, and the hearing was had in response to that order. The court of appeals decided that the order was not final, and stated further:

"Such orders not only lack the finality which is necessary to support an appeal, but it is usually said of them that they cannot be reviewed because they merely involve the exercise of the discretionary powers of the trial court."

An objection would have been made by complainant to the allowance of the appeal herein, if it had not been for the decision in the case of United States v. Philips, J., 107 Fed. Rep. 824. In that case an application for leave to intervene was denied, and the Circuit Court declined to allow an appeal, and the party asked for a mandamus. The court of appeals decided that inasmuch as there were two kinds of intervention—one belonging to the class of cases in which leave to intervene was entirely discretionary, and the other to that class in which the right was absolute, the correct practice for the chancellor, after refusing leave to intervene, was to grant an appeal, as a matter of course, and then for the party opposing the intervention to move for a dismissal.

The case at bar was one in which the matter was entirely discretionary.

Referring again to the case of Credits Commutation Co. v. United States, 91 Fed. Rep. 573, it is there stated:

"It is doubtless true that cases may arise where a denial of the right of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled, and can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which the third party asserts some right which will be lost in the event

> that he is not allowed to intervene before the fund is dissipated. In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervenor's claim by denying him all right to relief. The cases at bar, however, are not of that character."

Neither is the present case a case of that character, because the intervenors lose no right and do not lose their portion of the fund, but share with the other bondholders in whatever is derived from a foreclosure sale.

The same thing was decided in Hamlin v. Toledo R. R. Co., 78 Fed. Rep. 664, and in that case the appeal was allowed because the Circuit Court had gone on and decided that the parties desiring to intervene had no right to the fund and were not creditors, but the court of appeals said that the denial of an application to intervene was not a final decree, and that ordinarily no appeal would lie, and only allowed the appeal in that case because the decision was rendered by the Circuit Court, on the merits and the party, was thereby precluded from any right to the fund.

See also McLish v. Roff, 141 U. S. 661, 35 L. Ed. 893.

We submit, that for the reasons stated, the appeal should be dismissed.

ALEXANDER & GREEN,
CHAS. MONROE,
Solicitors for Mercantile Trust Co.